DATE: June 4, 1999

CASE NO.: 1999-CAA-14

IN THE MATTER OF

WALTER R. MOORE,
Complainant

v.

U.S. DEPARTMENT OF ENERGY,
Respondent.

RECOMMENDED DECISION AND ORDER

This matter arises from a complaint of retaliation pursuant to the Clean Air Act (CAA), 42 U.S.C. §7622 (1994), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9610, and the Surface Transportation Assistance Act (STAA), 49 U.S.C. §31101. The complaint was filed on February 3, 1999 with the Occupational Safety and Health Administration (OSHA), United States Department of Labor. The complaint alleged Mr. Moore was retaliated against by Respondent for filing his July 31, 1998 complaint when Respondent made retaliatory statements and improper *ex parte* filings with the DOL OSHA investigator.

On April 8, 1999, OSHA dismissed the complaint on the following grounds: (1) Complainant is exempt from the STAA; (2) the filing under the CAA does not contain an alleged violation of the Act; (3) DOE's response to the allegations was not considered retaliation; (4) the failure of DOE to provide Complainant with a copy of their response does not constitute a violation of any Act for which DOL has authority in; and (5) there was no evidence that Complainant actually engaged in activities protected under the CERCLA.

The Complainant timely appealed the dismissal of the complaint. Pursuant to the direction of this Court, Complainant filed an Amended Complaint on May 13, 1999. On May 24, 1999, Complainant filed a Motion for Partial Summary Judgment and a Motion to Compel Discovery. On May 28, 1999, Respondent filed a Motion to Dismiss and a Motion to Stay Proceedings including discovery and the hearing set for June 14, 1999.

On May 28, 1999, a telephone conference was held with counsel for the parties. Mr. Slavin expressed his opposition to the Motion to Stay Proceedings and his desire that the hearing be held as scheduled. Mr. Slavin requested the Respondent's motions be faxed to him and he would file his reply by fax before midnight on June 1, 1999. I required Respondent to fax its motions to Mr. Slavin and gave Mr. Slavin permission to fax his reply to the motions before midnight on June 1, 1999. I delayed the pretrial exchange of witnesses and exhibits until June 7, 1999, and I delayed the time for Respondent to respond to discovery until after I had ruled on Respondent's motions.

Respondent's Motion to Dismiss is based on arguments that (1) the STAA explicitly excludes federal employees from its provisions; (2) the Civil Service Reform Act, 5 U.S.C. §§2301, et seq., is the Complainant's sole remedy; (3) the United States has not waived sovereign immunity under the CAA and CERCLA; and (4) the Complainant fails to allege essential elements of a prima facie case under the STAA, CAA and CERCLA.

DISCUSSION AND FINDINGS

STAA Jurisdiction

The rules of practice and procedure applicable to administrative hearing under environmental whistleblower statutes do not contain a section pertaining to motions to dismiss. However, §18.1(a) provides that in situations not provided for in Part 18, the Federal Rules of Civil Procedure apply. Federal Rule 12(b)(1) provides for motions to dismiss for lack of subject matter jurisdiction. Two types of 12(b)(1) motions have been recognized. A "facial" 12(b)(1) motion merely questions the sufficiency of the pleading, and in reviewing this type of motion, the court takes the allegations of the complaint as true. The second type of 12(b)(1) motion is a "factual" motion. When a court reviews a complaint under a factual attack, no presumption of truthfulness applies to the factual allegations, and the court is permitted to consider affidavits and documents submitted in support of the motion. Ohio National Life Insurance Co. v. United States, 922 F.2d 320 (6th Cir. 1990).

Respondent has made a "factual" jurisdiction challenge and submitted documents in support of its motion to dismiss. It is well-settled law that the burden of establishing jurisdiction is on the plaintiff. Where the party seeking dismissal on grounds of lack of subject matter jurisdiction makes a factual attack and presents affidavits or documents, the burden placed on the plaintiff is not onerous as he is required only to demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss. Moreover, the trier of fact must consider facts in light most favorable to the plaintiff. Welsh v. Gibbs, 631 F.2d 436 (6th Cir. 1980)

An "employee" under the STAA does not include ". . . an employee of the United States Government, a state or a political subdivision of a state acting in the course of employment." 29 C.F.R. §1978.101(d); 49 U.S.C §31101(2)(B); and an "employer" under the STAA does not include the United States Government, a state or a political subdivision of a state. 49 U.S.C. §31101(3)(B).

Exhibit A to the complaint filed with OSHA is the alleged discriminatory *ex parte* communication. It identifies Complainant as an employee of the Transportation Safeguards Division of the Department of Energy. Complainant has not challenged this representation and there appears to be no factual issue that at all times relevant Complainant was and is an employee of the United States Government. Therefore, I grant Respondent's Motion to Dismiss the Complaint under the STAA.

Sovereign Immunity/Exclusive Remedy Under CSRA

Respondent next asserts that the Secretary lacks jurisdiction over the subject matter of the complaint as sovereign immunity has not been waived and that the CSRA is the exclusive means for resolving employment disputes between federal agencies and their employees. The Secretary has rejected similar argument that the CSRA provides a preemptive and exclusive remedy for federal employee whistleblowers in Conley v. McClellan Air Force Base, 84-WPC-1 (Sec'y Sept 7, 1993) and Pogue v. United States Dept. of Navy, 87-ERA-21 (Sec'y May 10, 1990), *rev'd on other grounds*, Pogue v. United States Dept. of Labor, 940 F.2d 1287 (9th Cir. 1987).

There is nothing in either the CERCLA or CAA to suggest exclusion of government employees. The Secretary has specifically found that the CERCLA contains express language subjecting Federal agencies to its provisions, including its employee protection provisions. The Secretary has also found that Congress intended all the requirements of the CAA to apply to the federal government. William L. Marcus v. U.S. Environmental Protection Agency, 92-TSC-5 (Sec'y Feb 7, 1994). Therefore, I deny Respondent's Motion to Dismiss the Complaint based on sovereign immunity and that the exclusive remedy is under CSRA.

Failure to State Claim

The standard for dismissal for failure to state a claim upon which relief can be granted is set forth in Varnadore v. Martin Marietta Energy Systems, 92-CAA-2, 92-CAA-5, 93-CAA-1, 94-CAA-2, 95-ERA-1 (ARB June 14, 1996). The facts alleged in the complaint are taken as true, and all reasonable inferences are made in favor of the nonmoving party. A dismissal is purely on the legal sufficiency of the complainant's case. Even if the complainant proves all of the allegations in the complaint, he could not prevail. Even if the facts alleged are taken as true, no claim has been stated which would entitle the complainant to relief. (Varnadore, at 38-39).

The complaint in this matter centers on the OSHA investigation in case No. 1998-CAA-16 (Moore I). Complainant complains that the response by Respondent's attorney (Exhibit A) to inquiries by the OSHA investigator in Moore I was an impermissible *ex parte* communication and was in retaliation for his filing of the Moore I complaint. He argues that despite his request to DOE that it serve any briefs or documents filed with the OSHA Administrator upon his counsel and despite the duty of all duly licensed attorneys not to file *ex parte* answers to complaints, Exhibit A was not shared with Complainant or his counsel until February 2, 1999, forty days after DOE's Motion to Dismiss was rejected.

A complaint filed pursuant to 29 C.F.R. §24.3(c) begins the process by which OSHA investigates and gathers data concerning the case. As part of its investigation, OSHA may question persons being proceeded against and other employees of the charged employer. 29 C.F.R. §24.4(b). A complaint filed pursuant to 29 C.F.R. §24.3(c) in an environmental whistleblower action is not a "complaint" under the ALJ Rules of Practice, which defines a complaint as "any document initiating an adjudicatory proceeding . . ." 29 C.F.R. §18.2(d). Complainant cites no regulatory, statutory nor judicial authority that imposes a requirement that a response to an inquiry during an investigation be served on the party initiating the investigation. In fact, 29 C.F.R. §24.4(c) provides that investigations shall be conducted in a manner which protects the confidentiality of any person other than the complainant who provides information on a confidential basis. *See* English v. General Electric Co., 85-ERA-2 (Sec'y Feb. 13, 1992).

Besides the lack of any legal requirement that Exhibit A should have been served on Complainant or his counsel, Respondent has submitted evidence that Mr. O'Dowd (the DOE attorney that filed Exhibit A) inquired of the OSHA investigator if he should send a copy of Exhibit A to Complainant or his counsel. Mr. O'Dowd was advised that all materials in response should be sent only to the OSHA investigator. (Attachment 1 to Memorandum in Support of Respondent's Motion to Dismiss the Complaint). The OSHA investigator states the Secretary has never required that items obtained in an investigation be filed with a complainant. (DOE Exhibit 2 to Attachment 1 to Memorandum in Support of Respondent's Motion to Dismiss the Complaint).

Besides the *ex parte* nature of the response filed in Moore I, Complainant also alleges (1) that Mr. O'Dowd failed to disclose in the response his own *ultra vires* personal agenda of hostility and animus against Mr. Slavin as a result of Mr. Slavin's action in other apparently unrelated cases; (2) that Exhibit A sets Mr. O'Dowd up as an authority on whistleblower law without benefit of oathtaking; (3) that Mr. O'Dowd takes the complaint personally; and (4) that Mr. O'Dowd made *ad hominem* accusation about Mr. Moore and his counsel filing a complaint for improper reasons.

In order to establish a prima facie case Complainant must show: (1) that he engaged in protected activity; (2) that Respondent knew of the protected activity; (3) that Respondent took adverse action against him; and (4) that the protected activity was the likely reason for the adverse action. Taking all the facts alleged in the complaint as true and making all reasonable inferences in favor of Complainant, I find that the Amended Complaint fails to allege that Respondent took any adverse action against Complainant. Nowhere does Complainant allege any act on the part of Respondent that affected Complainant's compensation, terms, conditions or privileges of employment. Nowhere does Complainant allege that Respondent intimidated, threatened, restrained, coerced, blacklisted, discharged or in any other matter discriminated against him.

Based on the standard set forth in Varnadore, it is clear that even if Complainant proved all of the allegations in the Amended Complaint filed pursuant to my pretrial order, he could not prevail. Thus dismissal for failure to state a claim is appropriate.

ORDER

1. Complainant's complaint under the STAA is hereby DISMISSED for lack of jurisdiction.

2. Respondent's Motion to Dismiss based on Sovereign Immunity/Exclusive Remedy Under CSRA is DENIED.

3. Complainant's complaint under the CAA and CERCLA is hereby DISMISSED with prejudice for failure to state a claim upon which relief can be granted.

4. The hearing scheduled for June 14, 1999, is hereby canceled.

5. All other relief sought by the parties in their respective motions is rendered moot by this decision.

SO ORDERED.

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LARRY W. PRICE
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).